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IN THE

Supreme Court of the United States

October Term, 1963.
No. 361.

L. R. JACKSON AND BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, as Trustees under the Will of G. A. RICHARDS, Deceased; and FRANCES S. CARTMELL (formerly FRANCES S. RICHARDS and FRANCES S. PARKER), as Executrix of the Will of said decedent,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR THE PETITIONERS.

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BRIEF FOR THE PETITIONERS.

Opinions Below.

The opinion and concurring opinion of the United States Court of Appeals for the Ninth Circuit [R. 32, 39] are reported at 317 F. 2d 821 (C. A. 9, 1963).

Jurisdiction.

The Opinion and the Judgment of the United States Court of Appeals for the Ninth Circuit in this action were entered on May 15, 1963 [R. 32, 39]. The peti-

tion for a Writ of Certiorari herein was filed on August 12, 1963. The Petition was granted by Order Allowing Certiorari dated October 28, 1963 [R. 40]. The jurisdiction of this Court is based on 28 U. S. C. 1254 (1).

Question Presented.

The question presented by this review is whether the Court of Appeals for the Ninth Circuit erred in holding that support payments to a California decedent's widow paid from the corpus of decedent's estate (which was decedent's separate property in its entirety) did not qualify as a deduction under the marital deduction provisions (Section 812 (e)) of the 1939 Internal Revenue Code, as amended, in computing federal estate tax due by reason of the decedent's death.

Statutes Involved.

The provisions of Section 812 (e) of the Internal Revenue Code of 1939, as amended, are set forth in Appendix A, *infra*, p. 1. The provisions of Section 812 (b) (5) of the Internal Revenue Code of 1939, as amended, are set forth in Appendix B, *infra*, p. 3. The provisions of Sections 680 through 682 of the California Probate Code are set forth in Appendix C, *infra*, p. 4.

Statement.

George A. Richards, a resident of the County of Los Angeles, California, died testate on May 27, 1951, leaving his widow, Frances S. Richards, and daughter, Rozene Richards Moore, surviving him [R. 7]. Decedent's will was duly admitted to probate and on June 19, 1951, his widow qualified as executrix thereof [R. 1, 7].

On June 30, 1952, pursuant to Section 680 of the California Probate Code, the Superior Court of the State of California for the County of Los Angeles ordered that the executrix be authorized and directed to pay to herself individually, as surviving spouse of the decedent, the sum of $3,000 per month from the corpus of the estate for her support and maintenance, beginning as of May 27, 1951, and continuing until further order of the court, but not to exceed a period of 24 months [R. 1, 7].

On the date of the court order, June 30, 1952, support allowance in the sum of $42,000 (14 monthly payments of $3,000 each) was then due and payable to decedent's widow [R. 20]. Said $42,000 and an additional sum of $30,000, or a total of $72,000, was in fact paid to Mrs. Richards from the corpus of the estate, which was the separate property of the decedent [R. 4, 24]. The total of all amounts received by the surviving spouse by reason of decedent's death, including said payments of support allowance in the amount of $72,000, did not exceed fifty per cent of the value of decedent's adjusted gross estate [R. 4].

Executrix filed a timely Federal Estate Tax Return on behalf of the estate and paid the tax shown due thereby [R. 2, 7]. On the Return the executrix claimed a deduction of the $72,000 support payments under Section 812 (e) of the Internal Revenue Code of 1939, as amended (the marital deduction provisions) [R. 2, 8]. The Internal Revenue Service, upon audit, disallowed the deduction. The executrix then paid the additional tax, together with interest thereon, which resulted from the disallowance of said deduction, and filed a claim for refund therefor [R. 2, 8].

Following disallowance of the claim for refund, the executrix filed suit for refund [R. 1]. The United States moved for a summary judgment, and it was granted by the United States District Court for the Southern District of California, Central Division, holding that none of the payments of support allowance to decedent's widow were deductible under the marital deduction provisions of the Internal Revenue Code of 1939, as amended (Section 812 (e)), in computing the estate tax due [R. 29].

This decision was appealed to the United States Court of Appeals for the Ninth Circuit [R. 30], which in its opinion and concurring opinion filed May 15, 1963, affirmed the judgment of the District Court [R. 32].

Summary of Argument.

In the District Court the taxpayer contended that the entire $72,000 of support allowance paid to the decedent's widow should be allowed as a deduction under the marital deduction provisions and that in any event not less than the $42,000 portion of the support payments which vested on the date of the court's order should be so allowed. Counsel for the United States conceded that the $42,000 portion of the support payments which were payable on the date of the court's order then vested in the widow [R. 20]. On appeal to the United States Court of Appeals for the Ninth Circuit it would have been presumptuous of taxpayer to urge that the entire $72,000 paid to decedent's widow should be allowed as a deduction, in the face of that court's decision in *Estate of Edward A. Cunha v. Commissioner*, 279 F. 2d 292 (C. A. 9, 1960). Taxpayer did urge in the Court of Appeals that support payments which are *vested* in a surviving spouse do not

fall within the scope of the decision in *Estate of Cunha, supra,* and are not a terminable interest and should be allowed as a deduction under the marital deduction provisions. It was taxpayer's position, as held by the Court of Appeals for the Fifth Circuit in *United States v. First National Bank & T. Co. of Augusta,* 297 F. 2d 312 (C. A. 5, 1961), that state law is determinative as to whether support payments are vested; that under California law a support allowance which is due and payable as of the date of the court order granting it is indefeasibly vested in the surviving spouse as of said date; that the date of the court order granting the allowance is the applicable date for the determination of whether it is vested under the marital deduction provisions; that said rule gives effect to the expressed intent of Congress; and that in the case at bar the $42,000 which was due and payable on the date of the court order was then vested in decedent's widow and should have been held to be deductible under the marital deduction provisions.

At the argument in the Court of Appeals, counsel for the United States conceded that the $42,000 portion of the award was vested, but contended, that in determining whether an interest in property is a terminable interest under Section 812 (e), the critical point in time is the instant of the decedent's death; and, in the alternative, that viewing the situation as of the date of the court order, the widow's allowance in question was a terminable interest. The Court of Appeals affirmed the decision of the District Court, concluding: "Assuming, without deciding, that the terminable character of such interest must be determined at the date of the court order . . . rather than at the date of decedent's death, we hold that the interest in property

passing would terminate or fail upon the occurrence of an event or contingency, namely, the death or remarriage of the widow" [R. 38].

Under California law decedent's widow's right to the $42,000 vested portion of the award would have survived her death or remarriage and would not have terminated (*Estate of Blair v. Ruoff*, 42 Cal. 2d 728 (269 P. 2d 612 (1954); *In re Lux*, 114 Cal. 73, 45 Pac. 1023 (1896); 1 Condee, *California Probate Court Practice*, Sec. 464; 3 *Bancroft's Probate Practice*, 2d Edition, Sec. 732).

If qualification of support payments under the marital deduction provisions is to be governed in part by the principles and standards which were applicable under 1939 Internal Revenue Code Section 812 (b) (5), as appears to have been the intent of Congress, the entire $72,000 of support payments awarded to decedent's widow should qualify for deduction under the marital deduction provisions, as they were reasonably required and actually expended, paid in a form which would make them a part of the widow's estate if not consumed, and did not together with other qualifying property exceed fifty per cent of decedent's "adjusted gross estate."

ARGUMENT.

I.

Under the Rule of Decisions in Which the Commissioner of Internal Revenue Has Acquiesced, Petitioners, at a Minimum, Should Have Been Allowed a Deduction Under 1939 Internal Revenue Code Section 812 (e) for the Support Payments Which Became Vested in Decedent's Widow at the Time of the Probate Court's Order.

"By a decree . . . . the Probate Court . . . . directed the executor of the decedent's estate to pay" to the decedent's surviving spouse a lump-sum support allowance "and that amount was paid to" the decedent's surviving spouse "as directed." If the allowance, once made, would fail under State law upon the happening or failure to happen of an event or contingency, it constitutes a terminable interest and is nondeductible. If the reverse is true, it is deductible." The "*right* to such support is vested upon the creation of such relationships. The necessity in nearly all States that such vested rights may be exercised only by application to the court having jurisdiction of the probate of an estate does not prevent the vesting of such rights nor does the failure to make such application bring such rights within the terminable interest rule. . . . Present the necessary relationship of the applicant to the decedent, the only issue before the Probate Court raised by the application made by this decedent's spouse was the amount of such allowance. The amount thereof under the quoted . . . . statutes is governed largely by the size and nature of the assets of decedent's estate, the mode of life of decedent and her husband prior to decedent's death, and the needs of the surviving spouse. The State court has con-

sidered these criteria and rendered its decision. No other provision of State law which has been pointed to or which research has disclosed would specifically render the amount actually paid in a lump sum to the surviving spouse recoverable by the estate in case of . . . death or remarriage. . . . The allowance here at issue, providing as it does for a single payment, representing the current cost of support of the surviving spouse, and not recoverable by the estate upon the happening or failure to happen of any event or contingency, we hold does not constitute a terminable interest and is deductible from the gross estate."

The foregoing quotation is from the opinion of the court in *Estate of Margaret R. Gale*, 35 T. C. 215, 217-221 (1960). The Commissioner of Internal Revenue has acquiesced in this decision (1962-2 C. B. 4). The entire factual statement in the quotations can be applied to the $42,000 vested lump-sum portion of the $72,000 award to the decedent's widow in the case at bar. The District Court and the Court of Appeals, Petitioners submit, should have held that no less than this $42,000 was deductible under Section 812 (e) of the 1939 Internal Revenue Code as amended.

At the hearing in the District Court on the motions for summary judgment [R. 20] and in the argument before the Court of Appeals, counsel for the United States conceded that this $42,000 of the support allowance paid to decedent's widow vested in her when the Probate Court's order was made, and it is clear under the law of California that support allowance is indefeasibly vested in the surviving spouse at the time of the court order granting it to the extent that it is due and payable at such time. The Supreme Court of the

State of California in the case of *In re Lux*, 114 Cal. 73, 45 Pac. 1023 (1896), held that the surviving spouse's right to widow's allowance payments due and payable prior to her death were vested in her and that her estate was entitled to them. In the *Lux* case the next of kin of the decedent appealed from an order of the court which awarded the widow an allowance of $2,500 a month for her support during the settlement of the estate. During the pendency of the appeal many of the monthly payments were not made and before the decision of the California Supreme Court was rendered Mrs. Lux died. The question was then presented as to the right of her estate to the amounts which had accrued to the date of her death, but which had not been paid. As to this, the court said:

> ". . . the point is made by the appellants that the right died with her as to all the allowance not actually paid her before her death. The views of this court on that point were pretty fully indicated at the oral argument by conversations between counsel and the chief justice. It is sufficient to say that the order, like any money judgment, was the property of the respondent; the appeal merely suspended its operation; but upon its affirmance, if pending the appeal she has died, it goes to her heirs or personal representatives" (p. 81).

See, also, *Bancroft's Probate Practice*, 2d Ed., Vol. 3, Sec. 732 and *California Probate Court Practice*, by Newcomb Condee, Vol. 1, Sec. 464.

The vesting of the accrued $42,000 in the case at bar is clear. In *Estate of Michael G. Rudnick*, 36 T. C. 1021 (1961), vesting was not so clear, but the Commissioner of Internal Revenue has acquiesced in the Tax Court's *Rudnick* decision (1962-1 C. B. 5).

Petitioners submit that the decision in *Estate of Gale, supra,* and *Estate of Rudnick, supra,* in which the Commissioner of Internal Revenue has acquiesced, and other decisions hereinafter mentioned, compel the conclusion that decedent's estate, at a minimum, should have been allowed a deduction under Section 812 (e) for the $42,000 of support payments which became vested in decedent's widow on the date of the Probate Court's order.

II.

The Decision of the Court of Appeals Herein Conflicts With Decisions of the Courts of Appeal for the Fifth and Eighth Circuits and With the Preponderance of Other Recent Decisions on the Issue.

In *United States v. First National Bank & T. Co. of Augusta,* 297 F. 2d 312 (C. A. 5, 1961), the U. S. Court of Appeals, Fifth Circuit, held that support allowance to which the decedent's widow became entitled as of the time of the court's order granting the award was deductible under the marital deduction provisions. The opinion of the court, which is reproduced in the Petition for Writ of Certiorari herein (at Appendix E, pp. 14a through 24a thereof), includes the following:

> "We go further, however, in an effort to squarely meet the issue raised by the government, which rests on the assumption that the amendatory bar or limitation is substantive. Simply stated, it is that the requirement that the widow be in life and widowhood is such an event or contingency within the meaning of § 2056(b) as will render the award terminable, even when it has been made and has under the statute vested indefeasibly.

"To reach this position it is necessary to consider the interest in property passing under § 2056(a) as being the statutory right of the widow to the award at the time of the death of the husband, rather than as being the interest in property itself, once it arises, which is upon the award by the court.

"Certain confines have already been marked out by the courts relative to the meaning of § 2056 and its predecessor, § 812(e) of the Internal Revenue Code of 1939 as amended, as they relate to a widow's support allowance. It was first contended that such an allowance was not an interest in property passing from decedent as defined in these sections. Estate of Rensenhouse, 1956, 27 T.C. 107. On appeal, 6 Cir., 1958, 252 F. 2d 566, this position was abandoned by the government, and was not reasserted on remand to the tax court. 31 T.C. 818 (1960). In addition, the government acceded to the position that such an allowance is an interest passing from the estate of decedent within the meaning of the statute in Estate of Edward A. Cunha, 1957, 30 T.C. 812, affirmed 9 Cir., 1960, 279 F. 2d 292, cert. den. 1961, 364 U.S. 942, 81 S. Ct. 460, 5 L. Ed. 2d 373; Molner v. United States, D.C.N.D. Ill. 1959, 175 F. Supp. 271; Estate of Margaret R. Gale, 1960, 35 T.C. 215; Estate of Michael G. Rudnick, 1961, 36 T.C. No. 105; Estate of William Lamar Hailey, 1961, 36 T.C. No. 8; and most recently in United States v. Quivey, 8 Cir., 1961, 292 F. 2d 252. Cf. Reynolds' Estate v. United States, D.C.E.D. Mich. 1960, 189 F. Supp. 548; Rev. Rul. 83, 1953-1 Cum. Bull. 395; Rev. Rul. 56-26, 1956-1 Cum. Bull. 447.

"Further the rule has been established that the question of the terminability of the interest or award is to be decided upon the law of the state where the interest arose, using the rule of examination of the interest at the time that interest arose, treating that time as being at the time of the court award."

In *E. O. Bookwalter v. M. Phelps, Exrx.*, Dkt. No. 17,339, Dec. 11, 1963, 64-1 USTC 12,203, the U. S. Court of Appeals, Eighth Circuit, held that a $20,000 lump-sum award to the decedent's surviving spouse under Missouri law qualified for deduction under the marital deduction provisions and was not a terminable interest. The court found that under the law of Missouri the right of the surviving spouse vested in her at the date of the decedent's death and that the award once made belonged to the widow and no longer constituted property of the decedent's estate. On the basis of these findings the court refused to follow its prior decision in *United States v. Quivey*, 292 F. 2d 252 (C.A. 8, 1961), and held that the requirements of the marital deduction provisions were satisfied. Similarly, in the case at bar the *right* of decedent's widow to support payments from the estate belonged to her when the decedent passed away and $42,000 of the award to her which was due and payable on the date of the court's order then became her property, not subject to divestment by death or remarriage, and was no longer property of the decedent's estate. *In re Lux*, 114 Cal. 73, 45 Pac. 1023 (1896).

Other recent decisions sustain Petitioners' position with respect to the $42,000 portion of the $72,000 of total support allowance paid to decedent Richards' widow. These include *Estate of William A. Landers*, 38 T. C.

828 (1962); *Estate of P. D. Rensenhouse,* 31 T. C. 818 (1959), on remand 252 F. 2d 566 (C.A. 6, 1958); *Candler v. United States of America,* 61-2 USTC par. 12,045 (1961), aff'd on another point in 303 F. 2d 439 (C.A. 5, 1962); *Molner v. United States of America,* 175 F. Supp. 271 (1959); *Estate of Wm. Paddock,* 20 T. C. M. 1350 (1951); *Reynolds' Estate v. United States of America,* 189 F. Supp. 548 (1960); *Estate of Oliver B. Avery,* 40 T. C. 392 (1963); and *Gardner's Estate v. United States,* 220 F. Supp. 196 (1963).

The opinion of the Court of Appeals herein states two reasons for its decision. Both appear to be erroneous. The first is that a decision for the taxpayer would require the widow's allowance to be "fractionalized" into two interests, one vesting as of the date of the court order and the other not vesting. In support of this the court states: "Section 680, Probate Code, *supra,* contemplates one order for family allowance during the progress of the settlement of the estate but limited in time by the court order. Under the section such order may be made at any time after the granting of letters of administration or letters testamentary. Under appellant's contention, if the court order in question had been made one month after date of death, only one month's allowance would vest and the monthly allowance for the remaining twenty-three months would not, and if the court order had been made at the end of the twenty-four months fixed in the court order, the entire interest vests. No decision cited to us supports the bifurcation suggested by appellant." [R. 38]. Under the law of California, support allowances accrue on a monthly basis (*Estate of Chapman,* 158 Cal. 740, 110 Pac. 302 (1910); *Estate of Coffin,* 16

Cal. App. 2d 532, 61 P. 2d 81 (1936).) On the date of the court order, decedent's estate was indebted to Mrs. Richards in the sum of $42,000. *In re Lux*, 114 Cal. 73, 45 Pac. 1023 (1896).

The California courts have expressly held that Section 680 of the Probate Code does not prohibit there being more than one order for family allowance during the progress of the settlement of an estate. In many estates several such orders are made. *Estate of Broad*, 134 Cal. App. 196, 25 P. 2d 31 (1933); *California Estate Administration* (Continuing Education of the Bar) par. 30.20, p. 723.

The second reason given by the Court of Appeals for its decision herein is that "the term 'property' used in Section 812 (e), as applied to a widow's allowance in California, refers to the assets of the estate and not to the right to receive the allowance" [R. 38] and that the "interest in the property passing would terminate or fail upon the occurrence of an event or contingency, namely, the death or remarriage of the widow" [R. 38]. In the case at bar, $42,000 of the support allowance belonged to decedent's widow on the date of the court order, and the right to this would have survived her death or remarriage. The "property" is not an inchoate right, but the widow's fixed claim on the date of the order to $42,000 of estate cash.

The judgment of the District Court [R. 27] and that of the Court of Appeals [R. 38] in this matter were founded primarily upon the prior decision of the Court of Appeals in *Estate of Edward A. Cunha*, 279 F. 2d 292 (C. A. 9, 1960). The issue of the deductibility of accrued and unpaid installments of support allowance was neither at issue nor considered by

the Tax Court or by the Court of Appeals in the *Cunha* case. It is submitted that *Cunha* is not valid authority for the judgments in the case at bar with respect to the fourteen monthly payments of $3,000. each which were due and payable to decedent's widow on the date of the Probate Court's order. And if the decision of the Court of Appeals herein holds that this $42,000 did not belong to decedent's widow on the date of the order, such a conclusion is indefensible for the reason that it ignores the terms of the order itself, ignores the law of the State of California, and ignores the concession of counsel for the United States [R. 20]. It is respectfully submitted that at least as to the $42,000 portion of the support allowance awarded to decedent's widow, the judgments of the courts below should be reversed.

III.

Congress Has Expressed Its Intention That Support Payments Be Deductible Under the Marital Deduction Provisions.

The Senate and House Committee Reports indicate that Congress intended that support payments be deductible under the marital deduction provisions (Section 812 (e) of the 1939 Code and Section 2056 of the Internal Revenue Code of 1954). General disallowance of support payments (including the payments in the case at bar) is inconsistent with, and contrary to, the mandate of Congress.

The marital deduction provisions were added to the Internal Revenue Code of 1939 as Section 812 (e) by the Revenue Act of 1948. In 1948 (and prior to 1950) support payments were deductible as a "standard deduction" under Section 812 (b) (5) (Appendix B,

infra), which provided a full deduction from the amount of the gross estate for such sums as were "reasonably required and actually expended for the support during the settlement of the estate of those dependent upon the decedent."

By the Revenue Act of 1950 Congress repealed Section 812 (b) (5) and in so doing said that payments of support allowance would continue to be deductible—but under Section 812 (e) rather than 812 (b) (5). The Senate Finance Committee Report specifically stated:

"SECTION 502. REPEAL OF DEDUCTION FOR SUPPORT OF DEPENDENTS.

"This section of the bill, which is identical with section 502 of the bill as passed by the House, amends section 812 (b) of the Code (relating to deductions from gross estate of a decedent) to eliminate, effective with respect to estates of decedents dying after the date of enactment of the bill, the deduction for amounts expended for the support, during the settlement of the estate, of dependents of the decedent.

"Under existing law amounts expended in accordance with the local law for support of the surviving spouse of the decedent are, by reason of their deductibility under section 812(b), not allowable as a marital deduction under section 812(e) of the code. However, as a result of the amendment made by this section, such amounts heretofore deductible under section 812(b) will be allowable as a marital deduction subject to the conditions and limitations of section 812(e)." (S. Rep. No. 2375, 81st Cong., 2d Sess.; 1950 U. S. Code Cong. Serv., Vol. 2, p. 3191; see also H. R. No. 2319, 81st Cong., 2d Sess; 1950-2 C.B. 380, 478).

During the 34 years when Section 812 (b) (5) and its predecessor sections were a part of the "modern" estate tax law* the rules and standards governing the deductibility of support payments became well defined, manageable and workable. The statutory mandate under Section 812 (b) (5) (Appendix B) that support allowances be "reasonably required and actually expended" caused little friction. By the time an estate tax return had been filed and the audit procedure initiated, some 27 months or more had elapsed from the date of the decedent's death and the total allowance awarded to the surviving spouse had usually been paid in full. The representative of the estate and the auditing internal revenue agent generally had no difficulty in agreeing upon the amount to be allowed as a deduction under Section 812 (b) (5).

When support allowances were moved from the "standard deduction" section of the estate tax law to Section 812 (e), did Congress intend to completely eliminate this history, or did it intend only that *"amounts heretofore deductible under Section 812 (b) (5) will be allowable as a marital deduction,"* as it specifically said? If words have meaning, Congress did not intend to emasculate the deduction for support payments, but rather intended to continue the deduction for the same payments made in the same way, subject only to the general scheme of the marital deduction

*The first support allowance provision in the "modern" estate tax law appears in Section 203 of the Revenue Act of 1916. This section permits a deduction in computing the value of the net estate of amounts paid for ". . . support during the settlement of the estate of those dependent upon the decedent . . ." No examination has been made of the 1797 act, which was repealed in 1802, the 1862 act, which was repealed in 1870, the 1894 act, which was held unconstitutional, or the 1898 act, which was repealed in 1902.

provisions which is that property qualifying for a marital deduction should go to the surviving spouse in a way to insure that it would become a part of the surviving spouse's taxable estate if not consumed and that the total amount allowed as a marital deduction should not exceed fifty per cent of the decedent's "adjusted gross estate."

This intention of Congress has been recognized by many decisions, including *United States v. First National Bank & T. Co. of Augusta*, 297 F. 2d 312 (C.A. 5, 1961) and *Estate of William A. Landers*, 38 T. C. 828 (1962).

The general purpose of the marital deduction provisions of the Internal Revenue Code is to equalize the burden of estate taxation between separate property and community property jurisdictions. This was well expressed in the recent decision of this Court in *United States v. D. A. Stapf, Exr.*, Dkt. No. 54, Dec. 2, 1963, 63-2 USTC 12,192, in which Mr. Justice Goldberg, in delivering the opinion of the court, stated:

> "Our conclusion concerning the congressionally intended result under Section 812 (e) (1) accords with the general purpose of Congress in creating the marital deduction. The 1948 tax amendments were intended to equalize the effect of the estate taxes in community property and common-law jurisdictions." (Citing in part H. R. Rep. No. 1274, 80th Cong., 2d Sess., pp. 24-26, and S. Rep. No. 1013, 80th Cong., 2d Sess., pp. 26-29.)

The opinion then notes that ". . . the primary thrust of this is to extend to taxpayers in common-law states the advantages of 'estate splitting' otherwise available only in community property states."

Disallowance of support payments is inconsistent with the "equalization purpose" of the marital deduction provisions in that it discriminates against payments from separate property as contrasted to payments from community property. Without the benefit of a marital deduction, support payments from a community property estate receive more favorable tax treatment than those from a separate property estate. Such payments from community property have the advantages of "estate splitting," whereas payments from separate property do not.

The general purpose of the marital deduction provisions "is that the spouse first to die shall be permitted to pass on to the surviving spouse free of estate tax up to one-half of his or her estate, provided only that the terms of the transfer are such that the property will be taxable in the estate of the surviving spouse." *Estate of Pipe*, 23 T. C. 99, 104 (1954), affirmed 241 F. 2d 210 (C.A. 2, 1957), cert. den. 355 U. S. 814 (1957). (See also *Dougherty v. United States*, 292 F. 2d 331 (C.A. 6, 1961).

In *United States v. D. A. Staff, Exr., supra*, this Court also said:

> "The purpose, however, is only to permit a married couple's property to be taxed in two stages and not to allow a tax-exempt transfer of wealth into succeeding generations. Thus the marital deduction is generally restricted to the transfer of property interests that will be includible in the surviving spouse's gross estate." (Indicating in the footnote that "The congressional concern with the eventual taxability of marital-deduction property is indicated by the terminable interest rule of § 812 (e) (1) (B).")

In the case at bar the widow's allowance was in fact received by the surviving spouse and will be includible in her gross estate if not consumed. The application of the marital deduction to such payments will not permit a tax-free transfer of wealth into the next generation.

IV.

The Terminable Interest Portion of the Marital Deduction Provisions Should Not Apply to Cash Payments of Support Allowance.

The terminable interest portion of the marital deduction provisions is set forth in Section 812 (e) (1) (B) of the Internal Revenue Code of 1939, as amended (Appendix A), and reads in part as follows:

> "812 (e) (1) (B) *Life Estate or Other Terminable Interest.*—Where, upon the lapse of time, upon the occurrence of an event or contingency, or upon the failure of an event or contingency to occur, such interest passing to the surviving spouse will terminate or fail, no deduction shall be allowed with respect to such interest—
>
> "(i) if an interest in such property passes or has passed (for less than an adequate and full consideration in money or money's worth) from the decedent to any person other than such surviving spouse (or the estate of such spouse); and
>
> "(ii) if by reason of such passing such person (or his heirs or assigns) may possess or enjoy any part of such property after such termination or failure of the interest so passing to the surviving spouse;

and no deduction shall be allowed with respect to such interest (even if such deduction is not disallowed under clauses (i) and (ii)—

(iii) if such interest is to be acquired for the surviving spouse, pursuant to directions of the decedent, by his executor or by the trustee of a trust.

For the purposes of this subparagraph, an interest shall not be considered as an interest which will terminate or fail merely because it is the ownership of a bond, note, or similar contractual obligation, the discharge of which would not have the effect of an annuity for life or for a term.

It is apparent from the language of Section 812 (e) (1) (B) (quoted above) that it does not fit situations involving cash payments of support allowance.

After quoting the terminable interest rule, Judge Pierce, in his opinion in *Estate of P. D. Rensenhouse*, 31 T. C. 818 (1959), concurring in part and dissenting in part, states:

"It will be observed that, in order for the marital deduction to be disallowed under this subparagraph, the conditions of clauses (i) and (ii), or of clause (iii), must be met. None of these clauses has the remotest relation to a widow's award; and hence, the condition precedent to the application of said subparagraph to such an award, is not met.

"Moreover, it is obvious from the context of subparagraph (B), that the 'terminable interests' intended to be controlled thereby, are interests passing to a surviving spouse, which are not of such character that they would qualify for taxation in

the surviving spouse's estate—as, for example, a life estate, or an estate for a term of years, or a contingent interest that is subject to curtailment or extinguishment, and to which clauses (i) and (ii) or (iii) would pertain. The subparagraph has, in my view, no application whatever to interests which pass to the widow, *absolutely* for her sole use and consumption.

"Widows' awards simply do not fit into the pattern of subparagraph (B). . . . There is no corpus represented by the award, in which the widow has only a limited or contingent use; there are no remainders; and there is no reverter.

"I would have held that subparagraph (B) is in no way applicable to widows' awards."

To give effect to the clearly expressed intention of Congress, "property", within the meaning of Section 812 (e) (1) as applied to support allowances, must be held to be what the surviving spouse receives. If the support allowance is paid in cash, no interest in the award will terminate or fail or pass to another within the meaning of Section 812 (e) (1) (B). The excerpt from the opinion of the District Court in *Quivey v. United States*, 176 F. Supp. 433 (1959) (reversed 292 F. 2d 252; C. A. 8, 1961), as applied to support allowances paid in cash, would appear to be accurate:

"It is still necessary to define 'property' in order to determine whether the same property in which the widow has an interest may pass to another person. Property as being any and all of the assets of the estate of decedent has already been rejected as having results incompatible with the in-

> tent of Congress. So also must the Commissioner's view of 'property' be rejected. In the view of this Court, the 'property' consists of the assets actually paid to the widow out of the gross estate of the decedent, no more or no less" (p. 439).

The purpose of the marital deduction provisions is to equalize the imposition of estate taxes among residents of the various states, particularly between taxpayers in common-law and community property states. The application of the terminable interest rule to cash support allowance payments makes deductibility dependent upon the vagaries of local law. As Judge Pierce in his opinion in *Kensenhouse* stated: "The meaning and application of federal tax statutes is a federal question, which should be resolved by application of settled principles relating to the construction of federal tax statutes" (p. 826). . . . "In a statute of such fine mesh, I find no room for the inclusion of tests based on the peculiarities and policies of differing state laws, which are not specifically authorized" (p. 827). . . . "It cannot reasonably be inferred that Congress intended that the qualification of widow's awards for the marital deduction, should be subjected to the uncertainties and variations of local law" (p. 829). The present unsettled state of the law with respect to the deductibility of support allowances is due for the most part to the application of the terminable interest rule to situations it was not intended to fit. This situation is recognized by the United States in its memorandum filed in response to the Petition for a Writ of Certiorari herein. On page 3 of the Memorandum For the United States it is said:

> "The issue of the deductibility of widow's allowances under the marital deduction provisions of

the Federal estate tax recurs frequently. The decisions of the lower courts are, if not in conflict, far from consistent in rationale and approach. As in the present case, exceedingly narrow distinctions have been made to reconcile the decisions."

V.

The Measure of Deductibility Under the Marital Deduction Provisions for Cash Support Awards to a Surviving Spouse Should Be Determined to Be "Amounts Reasonably Required and Actually Expended," Subject to the Over-all Fifty Per Cent of Adjusted Gross Estate Limitation.

When the support order was made in decedent Richards' estate on June 30, 1952, $42,000 of the total award had accrued and then vested in decedent's widow, and $30,000 remained to be paid over a period of ten months at the rate of $3,000 a month. The entire $72,000 was in fact paid to Mrs. Richards in cash [R. 1, 7, 24]. It went to her in such a way as to become a part of her taxable estate, and the support allowance, together with other property of decedent's estate qualifying for the marital deduction, did not exceed fifty per cent of decedent's adjusted gross estate [R. 4].

Decisions hereinabove mentioned would deny a deduction under Section 812 (e) for the $30,000 paid to decedent's widow subsequent to the date of the court's order and have resulted in the failure to qualify of many support payments in California and other states.

Petitioners believe that the rule of these cases is not consistent with the intention of Congress and that they incorrectly state the applicability of Section 812 (e) to support allowances. One of the most carefully con-

sidered and well reasoned decisions on the subject is that of the District Court in *United States v. Quivey*, 176 F. Supp. 433 (1959) reversed in 292 F. 2d 252 (C. A. 8, 1961), wherein it is said:

> "Proceeding to the statute and its wording to determine whether the terminable interest rule is applicable to widows' allowances, an examination of the rule as set out there shows that the rule is inapplicable unless the widow's interest terminates or fails and, in addition, an interest in the same property in which the widow holds an interest passes or has passed from the decedent to another person, and such other person may possess or enjoy any part of that property after the termination or failure of the widow's interest in the same. In order to determine whether the widow's interest terminates, or whether an interest in the same property has passed to another person, it is first necessary to determine what constitutes the 'property' and what 'interests' are held in such with regard to this matter before us.
>
> . . . .
>
> "Were it not for the contrary Congressional intent, this Court might be inclined to hold that the 'property' consists of any and all of the assets of decedent's estate, and the 'interest' to be an inherently terminable personal right to an allowance from these assets for support and maintenance, thus denying the marital deduction in all cases of widow's allowances. This classification of the terms must be rejected because its results would be, as mentioned, contrary to the express intent of Congress.
>
> . . . .

"It is still necessary to define 'property' in order to determine whether the same property in which the widow has an interest may pass to another person. Property as being any and all of the assets of the estate of decedent has already been rejected as having results incompatible with the intent of Congress. So also must the Commissioner's view of 'property' be rejected. In the view of this Court, the 'property' consists of the assets actually paid to the widow out of the gross estate of the decedent, no more or no less.

"The legislative history is in accord with this classification. Section 812 (b) (5) of the 1939 Code provided for the deduction of amounts '*actually expended* for the support during the settlement of the estate.' (Emphasis supplied.) One of the intended effects of the repeal of this section was 'to shift the deduction for widows' awards from one subsection of section 812 to another; and thereby place the allowances under the 50 per cent limitation on aggregate marital deductions.' Concurring in part and dissenting in part opinion in Re Estate of Rensenhouse, supra, 31 T.C. at page 829. The 'property' involved in § 812 (b) (5) was the amount actually expended. In accordance with the substitution intended by Congress, the 'property' in § 812(e) and the subsequent, similar § 2056 of the 1954 Code, would consist of the amounts actually paid to the widow. . . .

"In view of these classifications, the terminable interest rule must be ruled inapplicable to the widow's allowance in Nebraska. As the property consists of only those sums actually paid to the

widow, the property is consumed at the termination of the widow's interest, and there exists no property in which the widow held an interest available to pass from the decedent or his estate to some other person who may possess or enjoy such property within the meaning of § 2056(b) (1) (A) and (B). Therefore, those sums actually expended as a widow's allowance under the Nebraska statutes are entitled to the marital deduction under § 2056(a).

"Compelling, although not controlling, this conclusion is the fact that the decedent cannot, either by his will or by statute, pass assets of his estate to the widow and through her into the hands of another by means of a widow's allowance without those assets being subject to an estate tax. Because the primary function of the terminable interest rule is to prevent the escaping of estate taxes by just such means, already unavailable under the widow's allowance, nothing impels me to apply the rule in this case."

The District Court's decision in *Quivey, supra,* was reversed by the Court of Appeals for the Eighth Circuit largely upon the authority of *Estate of Edward A. Cunha v. Commissioner,* 279 F. 2d 292 (C. A. 9, 1960), which was one of the first decisions of a United States Court of Appeals to consider the issue. When *Cunha* is re-read in the light of subsequent United States Court of Appeals decisions, it appears to lose its vitality. For example, what court would say today, as did the court in *Cunha,* that a support allowance will not qualify under the marital deduction provisions if the surviving spouse's right to the allowance might

have been lost had she died prior to the date of the court order? This view is rejected by the United States Court of Appeals for the Fifth Circuit in *United States v. First National Bank & T. Co. of Augusta*, 297 F. 2d 312 (C. A. 5, 1961), and by the United States Court of Appeals for the Eighth Circuit in *Bookwalter v. M. Phelps, Exrx.*, 64-1 USTC 12,203 (C. A. 8, 1963). Such a view has also been rejected by the Tax Court in *Estate of Margaret R. Gale*, 35 T. C. 215 (1960), and *Estate of Michael G. Rudnick*, 36 T. C. 1021 (1961). The Commissioner of Internal Revenue has acquiesced in both the *Gale* and *Rudnick* cases (1962-2 C. B. 4, 5).

Judicial developments since the date of the Ninth Circuit's decision in *Cunha* give a meaning and vitality to the District Court's decision in *United States v. Quivey*, 176 F. Supp. 433 (1959), reversed in 292 F. 2d 252 (1961), and to the concurring in part and dissenting in part opinion of Judge Pierce in *Estate of Rensenhouse*, 31 T. C. 818, 824 (1959).

Petitioners urge that in reviewing the judgments in the case at bar, this Court determine applicable standards for the deduction of support payments which are consistent with the intention expressed by Congress in 1950 that ". . . amounts heretofore deductible under Section 812 (b) will be allowable as a marital deduction . . ." Petitioners submit that "amounts reasonably required and actually expended" for the support of a decedent's surviving spouse were intended by Congress to be allowable under the marital deduction provisions, provided such payments go to the surviving spouse in such a manner as to be includible in the estate of the surviving spouse and provided such pay-

ments, together with other property qualifying for the marital deduction, do not exceed fifty per cent in value of the decedent's adjusted gross estate. Such a determination would do no more than bring former Section 812-(b) (5) deductions within the framework of the marital deduction provisions and promote equality of estate tax treatment for residents of common-law and community property jurisdictions, which is what the Revenue Act of 1948 and the repeal of Section 812 (b) (5) in 1950 sought to accomplish.

Conclusion.

For the reasons hereinabove stated it is respectfully submitted that the judgment of the court below should be reversed.

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January 21, 1964.

APPENDIX A.

Section 812(e) of the Internal Revenue Code of 1939, as Amended.

Sec. 812. Net Estate

For the purpose of the tax the value of the net estate shall be determined, in the case of a citizen or resident of the United States by deducting from the value of the gross estate—

* * * * *

(e) *Bequests, Etc., to Surviving Spouse.*—

(1) *Allowance of Marital Deduction.*—

(A) *In General.*—An amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate.

(B) *Life Estate or Other Terminable Interest.*—Where, upon the lapse of time, upon the occurrence of an event or contingency, or upon the failure of an event or contingency to occur, such interest passing to the surviving spouse will terminate or fail, no deduction shall be allowed with respect to such interest—

(i) if an interest in such property passes or has passed (for less than an adequate and full consideration in money or money's worth) from the decedent to any person other than such surviving spouse (or the estate of such spouse); and

(ii) if by reason of such passing such person (or his heirs or assigns) may possess or enjoy any part of such property after such termination or failure of the interest so passing to the surviving spouse;

and no deduction shall be allowed with respect to such interest (even if such deduction is not disallowed under clauses (i) and (ii)—

(iii) if such interest is to be acquired for the surviving spouse, pursuant to directions of the decedent, by his executor or by the trustee of a trust.

For the purposes of this subparagraph, an interest shall not be considered as an interest which will terminate or fail merely because it is the ownership of a bond, note, or similar contractual obligation, the discharge of which would not have the effect of an annuity for life or for a term.

APPENDIX B.

Section 812(b)(5) of the Internal Revenue Code of 1939, as Amended.

SEC. 812. NET ESTATE

For the purpose of the tax the value of the net estate shall be determined, in the case of a citizen or resident of the United States by deducting from the value of the gross estate—

* * *

(b) Expenses, Losses, Indebtedness, and Taxes.—Such amounts—

(1) * * *

(2) * * *

(3) * * *

(4) * * *

(5) reasonably required and actually expended for the support during the settlement of the estate of those dependent upon the decedent.

APPENDIX C.

California Probate Code.

Sec. 680. (Right to allowance: Who entitled: Necessity: Duration: Preference: Time of taking effect.) The widow, widower and minor children are entitled to such reasonable allowance out of the estate as shall be necessary for their maintenance according to their circumstances, during the progress of the settlement of the estate, which in the case of an insolvent estate, must not continue longer than one year after granting letters. Such allowance must be paid in preference to all other charges, except funeral charges, expenses of the last illness and expenses of administration, and may, in the discretion of the court or judge granting it, take effect from the death of the decedent.

Sec. 681. (When may be granted: Power of court: Granting prior to inventory: Subsequent granting or modification: Hearing: Notice.) Such allowance may be granted before the inventory is filed, either by the court or a judge thereof; in which case it shall continue until modified by the court. After the inventory is filed the court may grant such allowance, or may modify any allowance made before the filing of the inventory, upon the petition of any person interested and a hearing after notice given for the period and in the manner required by section 1200 of this code.

Sec. 682. (Where parties have other support: Need for allowance as affecting granting thereof.) If the widow, widower, or any minor child has a reasonable maintenance derived from other property, and there are other persons entitled to a family allowance, the allowance shall be granted only to those who have not such maintenance.